

In the Matter of the Impasse Between

COUNTY OF SACRAMENTO,

and

**SACRAMENTO COUNTY
ATTORNEYS' ASSOCIATION,
SUPERVISORY AND
NON-SUPERVISORY UNITS.**

FACTFINDING REPORT

AND RECOMMENDATION

PERB CASE # SA-IM-156-M

Hearing Held on: September 30, 2015

Recommendation: December 3, 2015

Composition of the Factfinding Panel

**Impartial Chairperson: Claude Dawson Ames, Esq.
Chairman Factfinding Panel
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Making Presentations to the Factfinding Panel

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I.

HISTORY OF NEGOTIATIONS

The Sacramento County Attorneys' Association ("Association") and the County of Sacramento ("County") have been parties to a memorandum of understanding for many years. The current agreement ("MOU") covers the negotiating period from 2013 to 2018. At the time the MOU was negotiated, the parties also negotiated a compensation side letter dated June 18, 2014. The content of that side letter reopener agreement is laid out below under the parties' Agreed-to Stipulations.

The parties began negotiations in accordance with their agreed wage reopener in Spring 2015. The first meeting was held March 9, 2015 and subsequent meetings ensued without resulting in an agreement. On March 18, 2015 the County sent the Association an email with attached salary surveys using Level I and Level III attorneys. One County survey used based pay only for Level III, finding those attorneys to be 7.6% below median and 10.5% below mean; the other survey added a 3.35% management differential to the Level III base pay and showed the attorneys to be 4.11% below median and 6.91% below mean. After it reviewed the surveys on March 26, 2015, the Association proposed the parties use Level III data, with a caveat, that the Association needed more

time to analyze the data. On April 23, 2015, the Association presented their analysis of the Level III survey. On May 6, 2015 the County responded that it did not wish to use Level III data since Level V had the most allocated attorneys. Still using a similar base pay, the parties considered County-generated surveys indicating that Level V, as of April 2015, was .15% above median and 6.54% below mean and Level IV as of March 2015 was 8.27% below median and 12.92% below mean. The Level IV survey used six comparable jurisdictions. On May 27, 2015, the Association provided the County with data indicating that Level IV contained the largest group of working attorneys.

On June 26, 2015, the County continued to use Level V, but updated the figures for projected pay for July 2015. Level V base pay for attorneys was 2.12% above median and 5.73% below mean. A survey adding the 3.35% management differential showed Level V at 5.29% above median and 2.3% below mean. However, the parties were unable to reach a consensus, resulting in impasse. Since the parties were unable to agree on which level to use, neither party proposed a specific percentage of salary increase. The County took the position that the attorneys do not meet its criteria for a wage adjustment based upon Level V with a median basis. Given this position, the Association did not make a proposal for a specific wage adjustment number.

Thereafter, the parties agreed to engage in fact finding pursuant to Section 3505.4 of the Meyers-Milias-Brown Act ("MMBA")¹ and PERB Regulation 32802. The Impartial Chair was jointly selected by the parties and a panel hearing in this matter was held in Sacramento, California on September 30, 2015. The parties agreed to waive all statutory time limits found in MMBA.

The County of Sacramento currently has a population of approximately 1.5 million. The County is the county seat for the state capital and is an urban area surrounded by more- rural counties. The Association represents all deputy district attorneys and public defenders practicing in the arena of criminal law. Attorneys in the County counsel's office practicing civil law were unrepresented until approximately 2010, when they became represented by a separate association. Historically, there had been salary parity tying together the County's criminal and civil attorneys.

¹ California Government Code Section 3505.4

II.

ISSUES PRESENTED

The parties were unable to stipulate to the framing of an issue and chose to present their respective issues to the fact finding panel for determination as follows:

The County's Issue:

Whether the Class of Attorney, Criminal Level I through V, is more than 5 percent below market, such that salaries should be adjusted pursuant to the compensation reopener agreement.

The Association Issue:

Whether, based on the compensation side letter reopener for the purposes of discussing wages, a wage increase is justified for the Attorney Levels I through V within the Association.

The panel has agreed to address the issues as framed by the parties.

III.

STATUTORY CRITERIA

California Government Code Section 3505.4(d) sets forth the criteria that fact-finders must consider in matters such as this one:

In arriving at their findings and recommendations, the factfinders shall consider, weigh, and be guided by all the following criteria:

- (1) State and federal laws that are applicable to the employer.
- (2) Local rules, regulations or ordinances.
- (3) Stipulations of the parties.
- (4) The interests and welfare of the public and the financial ability of the public agency.
- (5) Comparison of the wages, hours, and conditions of employment of the employees involved in the factfinding proceeding with the wages, hours, and conditions of employment of employees performing similar services in comparable public agencies.
- (6) The consumer price index for goods and services, commonly known as the cost of living.
- (7) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of

employment, and all other benefits received.²

(8) Any other facts, not confined to those specified in paragraphs (1) to (7), inclusive, which are normally or traditionally taken into consideration in making the findings and recommendations.

AGREED-TO STIPULATIONS

1. The parties have entered into a Compensation Side letter, dated June 18, 2014 which provides:

The parties agree that in fiscal year 2015-2016 of the 2013-18 Agreement, the County of Sacramento and the Sacramento County Attorneys' Association will reopen Article II and Article VII, Section 7.5 for the exclusive and sole purpose of discussing wages and professional reimbursement. This reopener does not allow for negotiation or imposition of wage reductions. The initial meeting shall occur no sooner than January 1, 2015, and upon request of the Association. The reopener of the Articles effects no other provisions of the Agreement. Any agreement resulting from this reopener will be incorporated into the Agreement as appropriate.

2. The parties stipulated at the factfinding hearing that:

- A. The issue of the County's ability to pay is not an issue before the panel, and
- B. The County's total compensation figure, on its Level V chart, for the City of Sacramento, is correct for the purposes of the factfinding hearing.

III.

RELEVANT FINDINGS FROM THE HEARING

As a result of the 2008 recession, Association Attorneys made pay concessions including a work furlough of fourteen (14) days. Due to parity with the County's civil attorneys, in the parties' 2009-2010 MOU, the Association members did not receive a 2.9% COLA³ that was given to other County bargaining units. In the first year of the parties' 2013-2018 contract, they were "out of contract," resulting again in no COLA for the unit members. The current Agreement does provide in Article II, Salaries, Section 2.1, for "Planned Compensation" of a 2% COLA for 2014-2015 with a 2.9% salary adjustment; a 2% COLA for 2015-2016; a 4% COLA for 2016-2017, and a 2-

² Emphasis added.

³ Cost of Living Adjustment

5% COLA, based on CPI⁴, for 2017-2018. The Association considers the current MOU to be a concession contract, since it waived the retroactivity of the 2.9% COLA (back to 2009), and because it required an employee to pick up of part of the retirement cost, which zeros out the 2016 4% raise.

The pattern of settlement between the County, its unrepresented employees and twenty-four (24) other bargaining units for the years 2013 to 2018, as compared to its MOU with the Association, shows that criminal attorneys did receive similar COLA's as the other employees and bargaining units with a few exceptions.

Government Code Section 3505.4(d) (referenced above) indicates that the fact finder shall consider, weigh and be guided by certain criteria. In the instant matter here, Criteria 5 and 7 are most germane; **Criteria 5 involves:** "Comparison of the wages, hours, and conditions of employment of the employees involved in the fact finding proceeding with the wages, hours, and conditions of employment of other employees performing similar services in comparable public agencies." **Criteria 7 involves:** "The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received."

The evidence presented before the Factfinding Panel indicates an agreement by the parties to the fifteen outside agencies to be used for comparison purposes and to the salary survey data comparing total compensation figures; rather than base salary alone, should be utilized. But, information comparing base salary or "monthly maximum" as well as different combinations of "total compensation" data for local and full labor markets was submitted, using salary data as of March, April and July 2015, using both the median and mean statistical methods of comparison. Given the totality of the evidence presented and argued, there does appear to be **six "bench marks" at issue relevant to Criteria 5 and 7:** (1) whether base (or monthly maximum) salaries versus total compensation figures should be compared, (2) whether a median or mean basis should be utilized to establish a reliable "average" salary, or "comparable," for the fifteen agencies comprising the full labor market, (3) which of the five Sacramento County attorney-criminal classification Levels

⁴ Consumer Price Index

should be utilized for comparison purposes, either as a single level or a combination of levels, (4) which of the classification Levels of the fifteen agencies should be used for comparison purposes, (5) what categories of benefits should be utilized as part of the total compensation used for comparison purposes; and (6) whether a 5% threshold figure should be used before a wage adjustment is considered.

In January 2001, an outside firm, Johnson & Associates, presented a report to the County Board of Supervisors titled the *Sacramento County Unrepresented Pay Plan*. The report indicates under **Developing an Effective Compensation Plan**:

The County's compensation plan is one of the most important elements in its personnel system. Combining a sound compensation system with an effective classification system contributes to the overall effectiveness of an organization. In broad terms, the County's compensation plan should:

- * Ensure that the County has the ability to attract and retain well-qualified employees; this is a fundamental objective of any pay plan since competitive salaries will enable the County to effectively recruit employees and minimize the high cost of employee turnover.
- * Provide a defensible and technically sound basis for compensating employees; by utilizing a combination of market "benchmarks" as well as sound, consistent internal alignment guidelines, the County maintains a credible, objective pay plan.
- * Establish fair and equitable salary levels for County jobs; this objective minimizes salary induced morale problems and ensures that jobs of comparable duties and/or market values are paid appropriately.
- * Ensure the County's compensation practices recognize internal job values and the unique structure of Sacramento County; while market data can be useful as an overall gauge of market competitiveness, most of the County's job classes are unique to the organization and should therefore be considered relative to other similar County jobs.

The pay plan indicates under **Labor Market Position**:

Considering that the recommended survey agencies represent both a comprehensive and balanced set of employers, and based on the County's historic pay practices, all market comparisons and analyses are based on the median (50th percentile) of the labor market. This statistic represents the exact "middle" of the labor market and is the most stable statistical measure for a maximum 15-employer sample size. The County's desired labor market position should be based on:

- * Priority of compensation versus other expenditures
- * Recruitment and retention needs and issues
- * The County's ability to sustain a more than competitive labor market position (i.e.,

75th percentile).

The pay plan discusses under **Market Pricing vs. Internal Equity**:

All compensation plans are developed using a combination of market data and an assessment of internal job worth. Since it is impossible to establish a perfect balance of these two facts (market data may suggest a salary that is higher or lower than internal job worth and visa versa), pay plans are generally developed with a primary emphasis on market data or internal job worth. Factors to consider include:

- * Employers in large, competitive metro areas generally need to be more sensitive to market data. For example, paying 5 or 10 percent below market average in the Bay Area will have a significant impact on an employer's ability to recruit and retain staff... In this example, market equity is probably more critical than internal equity.

- * On the other extreme, employers in isolated regions (such as Fresno) may be able to pay far below "market" rates since there are few competing employers within the immediate geographic area. In this example, internal equity is more important because a) there is little market pressure to influence pay and b) few comparable jobs will exist in the immediate job market.

Due to both the size of Sacramento County and its proximity to other Northern California agencies, the County's pay plan should be administered with a primary emphasis on market equity and a secondary emphasis on internal equity...

This pay plan was adopted by the Board and reflects the County's historical approach to analyzing and setting pay practices as well as the approach applicable to both unrepresented and represented employee groups. Under the plan, the County utilizes a "median" rather than a "mean" basis for market comparison and analysis. The County uses a fifteen-employer sample size, comprised of both a local labor market and a full labor market. The local market consists of Sacramento County plus seven (7) agencies: the State of California, the City of Sacramento, and the Counties of Solano, San Joaquin, Placer, Yolo and El Dorado. The full market areas includes these local agencies plus eight (8) agencies: the Counties of Santa Clara, Alameda, Riverside, Contra Costa, Ventura, San Bernardino and Fresno and the City and County of San Francisco. The parties presented survey data illustrating monthly maximum and total compensation figures for the local and the full market.

A median basis for market comparison arranges the fifteen (15) agencies by dollar amount of monthly compensation, such as from highest to lowest total compensation. For example, in the County's presentation of total compensation and full market for a total compensation comparison,

Santa Clara County ranks highest and Fresno County ranks the lowest. The median figure adopts the mid figure as the bench mark. In this County example, Placer County represents the mid-point bench mark at \$14,480. Using a mean basis for comparison, it adds up the compensation figures for all fifteen agencies, and divides the resulting total by fifteen. The resulting figure becomes the mean bench mark and in this example, it is \$15,129.

County Personnel Analyst Karen Farrel testified that she did not know why the County decided to use the median in 2001, other than that she felt the median is less skewed than the mean, if there are exceptionally high-or low-paid jurisdictions in the labor market. County Director of Labor Relations, Robert Bonner, testified that he was not aware of why the median is used, but use of both high and low comparable salaries as outliers balances out the survey. Mr. Bonner testified that the County does not currently follow the 75th salary percentile recommended in the Pay Plan, but uses a 50th percentile, consistent with use of the median statistic. He indicated that the County “generally” uses the median method, based on historical Board policy.

Consistent with the 2001 Pay Plan, the County utilizes a “threshold” bench mark approach whereby market-based salary adjustments only occur if a market bench mark is more than five percent below (or “out” from) the median. Ms. Farrel identified the 5% threshold as something the County has historically used and something other jurisdictions may use; however, she is not aware of any survey determining which or how many other agencies use 5%. She did not know why 5% is used, as opposed to another percent. Mr. Bonner was not aware of any data supporting or justifying use of a 5% threshold before a classification’s salary is adjusted.

The Association has not agreed to use the median basis for market comparison or the threshold limit of 5%.

The criminal attorneys in the bargaining unit comprise one classification, that of “Attorney - Criminal,” and the classification contains five levels. Level I is the entry level group, thus earning the least base salary; and attorneys generally progress from Level I up to Level IV by gaining an additional year of experience for each level.⁵ Progression up to Level IV generally occurs absent a performance-related issue serious enough to warrant termination. Rarely, does an employee not

⁵ As with most jurisdictions, employees may be hired with outside experience, allowing them to enter employment with Sacramento County at Level II, III or IV.

progress up the levels within the usual time frame due to a less-serious performance issue. Promotion from Level IV to Level V is at the discretion of the department head and does not occur for every attorney, even with additional years of service. The Class Specification for Attorney-Criminal indicates that the Level III attorney is the “full journey” level, litigating increasingly difficult and complex cases under general supervision. Level IV is the “advanced journey” level, litigating the most difficult and complex cases with minimal direction. Level V litigates demanding and critical cases requiring a highly-advanced degree of knowledge of legal processes, or acts in a lead capacity when the staff size is so large, or the work is so complex, as to require both a first-line supervisor and a lead attorney. A Level V attorney may also litigate death penalty, homicide with special circumstances, and adult sexual assault cases.

A email from Susan Elliott, Chief of Administrative and Fiscal Services with the County, on May 29, 2015, indicates that the District Attorney’s Office makes appointments to Level V “based upon performance.” Certified Public Accountant (CPA) Shayleen Mastagni testified on behalf of the Association, that Level V is an “elite” journey level having some supervisory functions and is a “performance pay” level. And when you look at Level V elite journey functions, you need to consider the performance pay of all other agencies. The Association’s survey of July 2015, prepared prior to the hearing and shows that when you are using total compensation, Level V is out approximately 10.12% using the median and out 9.18%, using the mean.

The highest number of allocated/budgeted positions is at Level V, and the lowest number is at Level III. As of April 2015 there were 94 Level IV’s and 81 Level V’s actually working for the County. There were 19 positions allocated to Level V which were under filled with four Level I’s and 15 Level IV’s. There were 26 vacant Level V positions. 73% of Level IV’s have 6 to 22 years of average service. The average number of years of service for a Level IV is 7.76 years and for a Level V is 15.44 years. The record indicates that it usually takes from four to five years to be promoted from Level IV to Level V.

Ms. Farrel and Mr. Bonner testified that the County Level III should not be used because it is not the top journey level. Attorneys do not stay at Level III for an extended period of time and there is not a large number of Level III’s, since Level III is not the highest-paid journey level. Level IV is not an appropriate level to use for the County, according to Ms. Farrel and Mr. Bonner, due to

the lack of an adequate number of comparable “mid-level” journey attorneys in the other jurisdictions. Some agencies have fewer levels than the County, with some only having an entry and a senior level. An agency may have a single classification with multiple steps. The County prefers use of its Level V as the highest-paid journey level with the largest number of allocated positions and has the most comparables in other agencies. The County does not consider Level V to be a performance-based level and disagrees with the Association. Ms. Farrel indicated that it is the County’s practice to give a wage increase to all levels within a classification if an increase is given to any of the levels.

Ms. Farrel further testified that it is the County’s position that it is appropriate to use total compensation with a full labor market, the median comparable agency, and their classifications equivalent to the County Level V. Looking at the attorney classifications in the fifteen jurisdictions, the County used some Level V’s and not Level IV’s, because classifications are not standardized between agencies. The County looked at the scope of responsibilities amongst their attorneys and used the highest-paid non-supervisory criminal attorneys. For Riverside County, she used a DDA⁶ IV-S rather than a IV-T because Riverside told her that the IV-T was not a regular classification such that an attorney received extra pay only while actually working on a death penalty case. For San Bernardino, she used a DDA IV rather than V because its Level V is a temporary compensation-differential based upon assignment. Ms. Mastagni argued that Riverside County’s DDA IV-T is comparable to Level V because of the nature of the duties, including death penalty cases. For San Bernardino, the Association compares its Level V to Sacramento’s Level V, which allows for comparison of each agency’s Level IVs.

In addition to the above salary provisions in the parties’ MOU, Section 2.3 of Article II provides for Benefit Maintenance, indicating that certain management benefits shall not be reduced. These include: vacation cash-in, a 3.35% management differential, an educational reimbursement of up to \$1200/year, and bilingual/bicultural pay.

The Association argues that some benefits encompassed in Section 2.3, i.e., vacation cash-in, management differential, bilingual pay and an additional benefit of longevity pay should be

⁶ Deputy District Attorney

included in the total compensation figure. Ms. Farrel did not include any performance pay factors such as longevity, bilingual pay, leave cash out or educational reimbursements since those benefits are not received class-wide. The County did use 401K matching funds in its total compensation study. But the Association feels, however, that if Level V is used, the survey should consider longevity pay received by the criminal attorneys or the comparable jurisdictions. Attorneys perched at this top level, either in the County or the other agencies, have the most years of service so it is appropriate to add longevity pay to their total compensation for the highest level attorneys. Also, if the County adds the management differential, it should use the full total compensation analysis, i.e., the County used the 3.35% management differential paid to its own criminal attorneys, but did not use any management differential for any other jurisdiction.

Along with numerous salary surveys prepared by both parties prior to the hearing, the Association also presented its final "March 2015 Salary Survey" for total compensation using the full labor market for Level V with scheduled increases for July 2015. This chart was not shared with the County prior to the hearing, due to the Association's feeling that every time the Association responded to a County survey, the County reacted by presenting yet another survey. The Association's survey shows Santa Clara County pays a monthly total compensation of \$21,212, Alameda County pays \$20,064, Riverside County pays \$17,804, Contra Costa County pays \$17,055, Solano County pays \$16,533, the City and County of San Francisco pays \$16,480, Placer County pays \$16,385, Ventura County pays \$16,339, the City of Sacramento pays \$15,535, San Bernardo County pays \$14,03, San Joaquin County pays \$14,352, El Dorado County pays \$13,868, the State of California pays \$13,122, Yolo County pays \$12,980 and Fresno County pays \$11,322. This survey results in the Level V attorneys being 11.65% under the median and 8.40% under the mean.

The County's salary survey figures for Levels I, III and IV, as described above under History of Negotiations, show the attorneys to be more than 5% out for all 3 levels. The County witnesses agreed that its initial surveys showed its Level III and Level IV attorneys more than 5% out.

As the Association did, the County also presented, a previously unshared new chart at the hearing. The County's chart utilizing the total compensation figures of the full market with a Level V attorney shows that Santa Clara County pays a monthly total compensation of \$20,523, Alameda County pays \$19,816, the City and County of San Francisco pays \$16,176, Riverside County pays

\$16,169, the City of Sacramento pays \$15,479, Contra Costa County pays \$15,363, Solano County pays \$15,061, Placer County pays \$14,480, Ventura County pays \$14,467, San Joaquin County pays \$14,281, San Bernardino County pays \$13,209, the State of California pays \$12,913, Yolo County pays \$12,563, El Dorado County pays \$11,313, and Fresno County pays \$10,915.

Sacramento County pays \$14,334 to its Level V attorney. Data provided by the County indicates that the total compensation median value of the full market group is \$14,480, resulting in the Level V attorney being 1% below median. It indicates that the total compensation mean of the group is \$15,129, resulting in the Level V attorney being 6% out. The data for total compensation includes base salary, health, dental, vision and life and in some cases, a deferred comp/401(k) match, "other pays," and in one instance the employer contribution to retirement.

IV.

POSITIONS OF THE PARTIES

A. The Association:

The current contract was a concession contract accompanied by a commitment by the County to engage in meaningful salary discussions through the reopener. The County's position has remained through out these discussions that the Association is entitled to nothing. The Association adamantly disagrees. The County's 5% threshold comes from a 14-year old study presented by the County without any justification or data; the study was designed to address unrepresented employees. This is an artificial threshold. But even if one were to accept the County's premise regarding the threshold, the attorney Levels I-V are more than 5% below median, with the average for Levels III, IV and V of 9.49% below median.

The only portion of the Association's total compensation study earnestly contested was longevity pay, with the County contending that its inclusion is inappropriate because not everyone gets it. But the County includes 401K matching in its study, which many employees do not choose to participate in. This is a faulty argument because total compensation necessitates inclusion of all potential available income. The attorneys are eligible for longevity pay, leave cash out and 401K if they meet the requisite criteria, and all of these benefits require action by the employee. The County's concern regarding the substantial longevity increase available to two counties in the labor market can

be considered but does not justify exclusion of longevity pay.

Further, the County uses Level V but excludes longevity pay. Level V's are the classification that would benefit from longevity pay so it should not be excluded from a total compensation analysis using that class. If the County eliminated all total compensation items, the result would be substantially the same. Using the County's presentation, the "monthly max" median salary for total compensation, full market shows the association members more than 8% out. Salaries for SCAA attorneys are clearly and significantly out of alignment with the surveyed jurisdictions. Whether looking at Levels III, IV, V or all three, the disparity in pay is substantial and must be addressed.

At the factfinding hearing, the Association argued that it had never agreed to the County's use of the median rather than the mean.

The County's unwillingness to meaningfully engage with the Association has led to this fact finding process. The panel should recommend a salary increase between 9% and 11% in order to simply return the attorneys to the median of the surveyed jurisdictions.

B. The County:

Level V is appropriate for purposes of salary comparison. It is the benchmark level because it is the highest journey level. It is correct to compare the County class of Level V to the other jurisdictions' closest Attorney matches regardless of what they are named. The total compensation survey presented by the Association is not a valid survey because add-on compensation items are variable or temporary. Some of the add-ons may or may not be appropriate since it is unknown whether the benefits are applied to all employees in the particular agency's class.

The County's survey for its Level V is appropriate and consistent with county salary survey practice for both represented and unrepresented employees. Level V is approximately 1% below median and thus there is no basis to adjust the attorneys' salary. The compensation package negotiated between the parties is consistent with the pattern of settlement negotiated between the County and 21 other bargaining units.

V.

ANALYSIS AND DISCUSSION

It is the role of the Panel to apply the relevant factors as set forth in MMBA, to the facts underlying the impasse presented, and to render its best recommendation in light of those factors. Several of the factors apply here and we review them below as follows:

The Interests and Welfare of the Public and the Financial Ability of the Public Agency.

The parties have stipulated that the ability of the County to pay is not at issue before the panel.

Comparison of Wages and Terms and Conditions of Employment with other Employees Performing Similar Work.

The Association provided testimony from CPA Mastagni during its fact finding presentation that Criteria 5 compares internal departments within the County, i.e., Association attorneys with the deputy sheriffs and the sheriff's management. The 2001 County Pay Plan recommends consideration of "sound, consistent internal alignment guidelines" and "other similar County jobs" but then goes on to say that; "*Due to both the size of Sacramento County and its proximity to other Northern California agencies, the County's pay plan should be administered with a primary emphasis on market equity and a secondary emphasis on internal equity...*" This weighting towards a full labor market analysis (external rather than internal) is consistent with the specific language of MMBA which compares the SCAA with comparable public agencies located in California. The SCDSA and LEMA are not separate public agencies, but are other public safety classifications within the County, performing dissimilar job duties, and thus this analysis will focus on a comparison between the Sacramento County criminal attorneys and similar criminal attorneys employed by the fifteen public agencies making up the full labor market.

As an additional preface, it is noted that neither party submitted its final survey figures to the other party prior to the factfinding hearing. While there was testimony as to conversations with personnel from other jurisdictions and as to review of the other agencies' MOUs, no corroborating documentary evidence was ever presented to the panel. The parties presented no independent financial analysis or testimony based on agreed financial data. This situation, along with the use of multiple changing and apparently self-serving bench marks, including classification levels and the move from base salary to total compensation, makes the salary survey data less than reliable in

attempting to determine the issues presented to the panel. All of which, coupled with a history of continued animosity and lack of trust between the parties, makes any intelligent recommendation in this impasse problematic and difficult at best.

With that being said, however, we first move to the issue of comparisons between criminal attorneys and comparable criminal attorneys, working at other public agencies. The first disputed bench mark is whether a base salary or total compensation comparison should be made. The initial salary surveys used a base salary or a base salary plus a 3.35% management differential, but later surveys concentrated on a total compensation approach. The Association has not clearly objected to the use of total compensation but the dispute between the parties has focused upon which benefits should be included within the total compensation umbrella. MMBA Criteria 7 offers guidance here since it considers overall compensation including, vacations, holidays and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received; can be used to measure total compensation.

Total compensation is most consistent with the language of the guidelines upon which this factfinding panel should rely. Use of a total compensation bench mark is not unreasonable, given that in our complex modern world, employers and association representatives have reached comprehensive agreements which include wages, medical and retirement benefits, as well as a host of other methods of compensation. When negotiating new agreements, the parties may trade off a change in one form of compensation for another benefit, such as these parties did when they negotiated a 4% wage increase in 2016, which will be zeroed out by an employee retirement pick up. In this atmosphere, a total compensation analysis is not an unfair or inequitable approach to the determination before the panel.

The second issue before the panel is which of the Level's of County attorney should be appropriately used. The County initially created salary surveys for Levels I and III and the Association offered and agreed to Level III, with some "tweaking" of the survey data. But as the parties continued in their negotiations, the County abandoned use of Level III and the parties discussed Levels IV and V. The County now urges the panel to use Level V and the Association suggests that Levels III, IV and V might be averaged. Given that Level III does not contain a significant number of attorneys and these attorneys do not remain at this level for an extended period, this is not considered the highest journey level. As such, it is the Panel's recommendation

that the Level III surveys be noted but not primarily relied upon in the final analysis. It is further noted that the salary surveys in the record for Level III use a base pay bench mark, which the Panel does not recommend be used.

As between Level IV and V, the evidence record is even less clear. The County argued that Level V is appropriate because it has the most allocated or budgeted positions, but the evidence indicates that there are more Level IV's working than Level Vs. Even for the budgeted Level V positions, some are under filled. There were 94 Level IV's and 81 Level V attorneys as of April 2015, which is not a substantial difference. However, given that the parties focused on Level V in their final presentations, the Panel will do so too, while also taking into consideration the results of the Level III and IV surveys.

An issue perhaps best considered in conjunction with the issue of the County attorney Level is the issue of the Level of comparable attorney in the outside agencies. There was general agreement between the parties as to most attorney Levels in those agencies. The two major disagreements were the Riverside and San Bernardino Counties which had two levels of top journey attorneys. The County argued that the attorneys in those two counties received performance pay while working on some level of special assignment. This argument is not persuasive in that the County urges use of its own Level V and those attorneys too work on similar complex cases, those being death penalty or special circumstances cases. These high profile cases display a similarity in services included in the Criteria 5 guideline and it would be reasonable to use the higher-paid Levels of Riverside and San Bernardino in comparison with Sacramento's Level V. It is noted that the step of which these two counties is used, does not make a significant difference in the survey outcomes.

The other related issue relevant to attorney Level is the issue of which benefits, besides base wage, are considered under a total compensation approach. The parties are in agreement that medical and retirement contributions are appropriately considered, and there has not been a major dispute as to the value of medical and retirement benefits. But the parties are in disagreement as to longevity pay, bilingual pay, 401k matching, educational reimbursement and leave cash in. The Association's position, that longevity pay is reasonably included if the Level V bench mark is utilized, is found persuasive, since longevity pay is most likely paid to the top tier, long term employees in an organization. Similarly, the County's argument that some benefits should be excluded because "not all employees claim them" while others are included (which also are not all uniformly paid), is

self serving. The exception to this is educational reimbursement, which is not traditionally considered compensation.

The next issue is mean versus median as the benchmark. The County asserts that historically it has “generally” used the median statistical method for all of its pay issues. The Association does not concede that the median is the appropriate approach. The argument put forth by the County in support of use of the median is that it reduces any impact by extremely high or low “outliers” as compared to use of a mean approach.

The Panel recommends the use of a mean approach, in light of the particular facts of the instant case. A review of the fifteen full labor market jurisdictions does not reveal any extremely high or extremely low salaries in the market. Rather, the fifteen agencies (or sixteen, if the County is included) have total compensation figures that are spread out on a fairly-graduated range of compensation. The Level V surveys proposed by the parties do not indicate that the pay figures in the full market are greatly skewed. An example of a skewed figure might be comparison of several employees in a classification with similar salaries, such as accounting clerks in a company’s accounting department, each making approximately \$50,000. To add the salary of the department’s controller making \$120,000 would skew the department salaries. When looking at the figures in the instant case, the highest and lowest salaries in the full market cannot be considered skewed. This is especially true when the Panel is considering a labor market consisting only of criminal attorneys and consisting of jurisdictions specifically chosen by the parties as comparable agencies. There being no true “outliers” in the salary surveys, the rationale for use of a median basis does not exist in this case.

This use of a mean approach is reasonable in light of the fact that this case involves negotiation between the parties of a matter which is subject to the collective bargaining process: wages and terms and conditions of employment. This is not a matter subject to a unilaterally-imposed management right, whereby the County may arbitrarily announce or impose that, “We must use this method because we have always used it.” This is especially true in light of the language of the 2001 Pay Plan, adopted by the County Board of Supervisors, which laid emphasis upon the primary goals of being able to: *“ensure that the County has the ability to attract and retain well-qualified employees... establish fair and equitable salary levels for County jobs...” in order to minimize “salary induced morale problems” and act “as an overall gauge of market competitiveness.”* Use of a statistical mean approach better serves these important goals and is less

biased in favor of the County.

Lastly, the evidence record indicates that the County uses a 5% “out” threshold before assessing a wage increase. However, the record contains no data supporting this use of a threshold and the County offers no justification for imposing a threshold of 5%, or of any other percentage, other than, that it has used this Board criteria historically on a unilateral basis. Given that the record contains no rational basis for the County’s refusal to consider any wage increase, in any amount, in this matter, its use of the 5% threshold is an arbitrary barrier. This is especially true when it is balanced against all the circumstances which support the Association’s expectation that the County would come in good faith to consider a wage increase as mutually contemplated by the parties’ negotiated wage reopener.

Any Other Facts, Not Confined to Those Specified in Paragraphs (1) to (7), Inclusive, Which are Normally or Traditionally Taken into Consideration in Making the Findings and Recommendations.

This catchall category considered in factfinding includes factors which go to the equities of each party’s respective position. Here, it appears that the equities reside with the attorneys. The Association emphasized that during their negotiations, the County “changed the target” by proposing first that Level III be used as the benchmark and later withdrawing that proposal and replaced that level with Level V. This was done after the data survey revealed that Level III was out of the 5%. As discussed above, whether the attorneys are below the mid point bench mark varies depending upon which other bench marks are used. The County initially proposed use of Level III and then produced testimony at the hearing that its practice is to consider the highest journey level. The same is true for the changing use of the base salary in the Level III survey to the use of total compensation for the Level V survey.

Whether the attorneys are “out” also varies depending on whether the median or mean method is used. Given that the surveys for Level’s III and IV support the Association’s position, the changing proposals from the County to finally reach a level which does not support a wage adjustment cannot be found to be either credible or sustainable.

Further, the County's position ignores the legitimate recommendations of the Pay Plan adopted by the Board of Supervisors regarding recruitment and retention, and employee morale.⁷ Instead, it relies on arbitrary bench marks which appear to be designed to thwart any wage adjustment for the Association's members.

The County's position appears to be inconsistent with the Agreement between the parties during the last bargaining session, whereby the Association agreed to what it perceived to be a concession contract, in exchange for a good faith consideration of a wage increase via this reopener. Given that the County does not dispute its ability to pay, equities lie with the Association's position in this matter.

CONCLUSION

The County presented testimony that it customarily utilizes the top journey level and total compensation bench marks when analyzing wage adjustments, but its actions here belie that position. It began discussions with the Association by presenting salary surveys for Levels I and III rather than Level IV or V, with a base pay calculation, neither of which comply with the County's own stated criteria. After the Association pointed out that both Level III and Level IV positions were out more than the County's threshold of 5%, the County then changed its position and asserted that a Level V must be used. The County relies on its chart for Level V with data that appears best suited to minimize the compensation differences between its criminal attorneys and comparable attorneys in the full market.

Given the multitude of examples within the salary survey data that support the Association's position that its members should be given a wage increase, this reliance on the few contrary results is self-serving to the County and cannot be relied upon by this Panel. However, in light of the wide range of results as to whether the attorneys should be granted an increase, depending upon all the shifting bench marks, it is recommended that the salaries of the classification of attorney-criminal be increased by an amount of 6%. This conclusion is supported by the County's own salary survey

⁷ The recommendation of a goal of meeting the 75th percentile salary parity is noted as a factor in the County's own Pay Plan, but is not relied upon by the Panel in reaching a conclusion as to the appropriate salary increase. There is no evidence of a practice between the Parties of using the 75th percentile recommended in the Pay Plan.


which shows a Level V attorney at 6% below mean using the total compensation benchmark for a full market study. Although it is true that the compensation package negotiated by the Parties in their current MOU is consistent with packages negotiated by the County with the majority of other bargaining units; the Parties' concurrent negotiation of a salary reopener agreement would be rendered meaningless and moot if this Panel disregarded the evidence supporting a salary increase for the County attorneys.

RECOMMENDATION

Given the record as a whole and the factors considered in making this evaluation and recommendation, the Factfinding Panel Chair recommends a wage increase of 6%. This is fair and equitable in the context of the wage reopener and the underlying "fundamental objectives" of attorney recruitment and retention, maintenance of employee morale, the arbitrary nature of the County's bench marks; and is within appropriate parity of other comparable jurisdictions.

Respectfully submitted,

Date: December 4, 2015



Claude Dawson Ames, Esq. Impartial Chairperson

DISAGREE:



Dennis Batchelder/Office of Labor Relations

AGREE:



Andrew Soloman/SCAA

Dennis Batchelder's Dissent follows.

Dennis Batchelder's Dissent:

The following dissent summarizes the issues that contradict the facts used in the analysis to reach the report's conclusion:

1. The class of Attorney, Level V, is appropriate for purposes of salary comparison. It is the benchmark level in the County Attorney classification, in that it is the highest journey level. It is correct to compare the Attorney, Level V to the highest journey level in other jurisdictions, regardless of the title other jurisdictions call the comparable classification.
2. The inclusion of salary add-ons, such as Longevity Pay, in determining total compensation is inappropriate, unless it can be shown that such add-ons apply to a majority of the employees in the class. For example, the County's Management Differential is received by all employees in the class of Attorney, Level V. On the other hand, including 10% longevity pay for jurisdictions like El Dorado County for employees that have been on the job for 30 years is inappropriate. Less than 2% of the County of Sacramento employees would qualify for such pay and it is reasonable to assume since no facts were presented by the Association that less than the majority of employees receive this type of compensation.
3. The County's survey for the class of Attorney, Level V, as presented during the fact finding hearing is appropriate and consistent with the County long standing practice when conducting salary surveys, both the agency's surveyed and the salary and benefits data collected. The County's survey shows the class of Attorney, Level V at approximately 1% below Median. Further, both in negotiations with represented bargaining units and when setting salaries for unrepresented employees, the County's has maintained the use of the median as the appropriate standard of measurement. The Association did not present evidence contrary to the County's position that the median is the appropriate measurement of salary. Suggesting the mean be used in lieu of the median on a one-time non-precedential basis acknowledges that the mean is not the standard of measurement used by the County for any bargaining unit and thus is inappropriate. The report should reflect the median as the appropriate measurement of salaries.
4. The compensation package negotiated between the SCAA and the County of Sacramento is consistent with the pattern of settlement between the County and 27 of the 30 bargaining units. This fact was been given no weight in the report and ignores a significant fact.
5. The rationale of the recommendation is inconsistent with the facts presented at hearing. There was no facts presented by either side of an issue with recruiting or retaining employees in the Attorney classification. The County testified that it has never used the 75th percentile in setting employee's salaries. Further, the Association did not present any evidence that the 75th percentile was ever used in prior negotiations or contemplated in the current impasse. The report erroneously concludes that an example used in a recommendation to the Board of Supervisors more than 10 years prior is the basis for a goal to maintain employees in the 75th percentile.

Upon reviewing the facts of the case and taking into consideration the issues summarized above, no further adjustment to the salary of the class of Attorney is warranted.